STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL P. HOULIHAN, as Personal Representative of the Estate of DANIEL RYAN HOULIHAN,

Plaintiff-Appellant,

v

JEFF ELLIS & ASSOCIATES, INC.,

Defendant-Appellee,

and

JOSH WELCH, DARCY FITCHKO and ROBERT PHELPS.

Defendants.

UNPUBLISHED
September 24, 1999

No. 206093
Oakland Circuit Court
LC No. 95-507816 NO

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

I

Plaintiff claims that defendant Ellis & Associates was negligent in performing its contract, resulting in the tragic drowning death of four-year-old Daniel Houlihan at Addison Oaks Park, part of the Oakland County Parks system. Plaintiff alleges that as part of its contract with Oakland County Parks, Ellis should have reviewed a specific defective procedure of Oakland County's park safety procedures. The procedure in question did not require lifeguards and other safety personnel to immediately search the water for a missing child. Plaintiff contends that if park employees had promptly conducted a water search when Daniel's mother reported him missing, Daniel would have been successfully rescued. Plaintiff claims that defendant Jeff Ellis & Associates, Inc, a private entity

contracted to provide Oakland County with an aquatic training program, was negligent performing its contract with Oakland County by failing to recommend revision to this specific procedure. The trial court granted defendant's summary disposition motion on the ground that defendant had no duty under the contract to review the disputed procedures or to recommend improvements.

II

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(8) test the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Id.* The court must grant the motion if no factual development could justify the plaintiff's claim for relief. *Id.* Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Bertrand v Allan Ford*, 449 Mich 606, 618; 537 NW2d 185 (1995).

A plaintiff must prove four elements in order to establish a prima facie case of negligence: (1) duty, (2) breach, (3) causation, and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The question—is there a duty—is ordinarily a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Whether a duty has been breached is a question of fact for the jury. *Perry v Hazel Park Harness Raceway*, 123 Mich App 542, 549; 332 NW2d 601 (1983). Cause in fact is a question of fact for the jury, while legal cause, also known as proximate cause, is generally a question of law to be decided by the court. *Gillam v Lloyd*, 172 Mich App 563, 580; 432 NW2d 356 (1988).

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition on the basis that defendant had no duty to review the County's procedures. The defendant's duty can be established by a contractual relationship. *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991). A professional who undertakes a service in a contract owes a duty to act with due care toward third parties who foreseeably will be affected as well as toward the other party to the contract. *Com'l Union Ins v Medical Protective Co*, 426 Mich 109, 124 n 5; 393 NW2d 479 (1986).

When contract language is not ambiguous, the issue of whether a party has a contractual duty to the other party is a question of law and the court is to construe the contract. *Century Surety v Charron*, 230 Mich App 79, 82-83; 583 NW2d 486 (1998). The contract at issue in this case states in Paragraph 1 that defendant had a general duty to provide a nationally recognized aquatic training program endorsed by the NRPA. Paragraph 2 lists five specific points that the program should cover. These are: lifeguard training, instructor training, aquatic facility inventory, three unannounced audits of two water parks, and the capability of providing liability insurance. Defendant contends that because the contract does not specify review of the County's procedures, as a matter of law they had no duty to do so, or that failure to do so did not constitute a breach of contract. We agree.

The ordinary meaning of this language is that, in fulfilling its primary duty of providing a nationally recognized aquatic training program endorsed by the NRPA, defendant was to include those five things. It is generally accepted that "one who undertakes to accomplish a certain result impliedly agrees to do everything necessary to accomplish such result . . ." 17A Am Jur 2d Contracts, §407, p 432. Accordingly, defendant was obligated to do whatever necessary to fulfill its five specific obligations under the contract, as well as anything else necessary to satisfy its general obligation. Plaintiff has not, however, adduced any evidence to show that NRPA endorsement required defendant to review or recommend emergency procedures with immediate water searches for missing children. Although plaintiff introduced evidence that some aquatic safety experts and organizations advocate such a procedure, there is no indication that such procedures were a condition of NRPA endorsements or a customary part of this type of contractual undertaking. Accordingly, the contract did not require defendants to review existing procedures and recommend this modification. Furthermore, plaintiff's evidence that defendant did, in fact, review certain procedures and recommend certain changes does not establish a contractual duty to review the procedure in question. Summary disposition on the duty/breach issue was thus proper.

After oral argument, plaintiff moved to supplement oral argument by brief, and we granted this motion. The dissent would reverse the trial court's grant of summary disposition on the basis of evidence that defendant endorsed national standards calling for a "three-minute" rule. However, the "three-minute" rule as described in plaintiff's supplemental materials would not have made a difference here. In order to withstand summary disposition, plaintiff had to demonstrate that defendant had a contractual duty to at least advise Oakland County to implement an immediate-search procedure for missing children last seen near the water. The "three-minute" rule adduced by plaintiff does not satisfy this requirement. The rule merely requires life saving personnel to be able to search the area and find a submerged guest within three minutes. This rule does not require immediate water searches for *all* missing persons, but only for those who are believed to be submerged. It does not, as plaintiff suggests, require lifeguards to search immediately the water for missing patrons who were last seen on land. Indeed, the supplemental materials say nothing with regard to the appropriate response when a child is reported lost, nor do they require lifeguards to assume that any missing child may be submerged.

II

Alternatively, we would affirm the trial court's grant of summary disposition on the ground that plaintiff failed to prove causation. Plaintiff argues that he provided sufficient evidence of causation to establish a prima facie case of negligence and thus, was entitled to proceed to trial. In order to establish causation in a negligence case, a plaintiff must prove (1) cause in fact, and (2) leal cause, also known as proximate causation. *Skinner v Square D Co*, 445 Mich 153, 162-163; 560 NW2d 475 (1994). The factual causation element is satisfied if the plaintiff shows that "but for" the defendant's negligence, there would not have been injury. *Id.* at 163. Proximate cause does not become an issue unless cause in fact is first shown to exist. *Id.* Cause in fact can be established by circumstantial evidence, but the plaintiff's burden to demonstrate causation is not lessened by the fact that an injury was unwitnessed. *Id.* at 163-164. Rather, a plaintiff must submit evidence substantial enough for a jury to conclude that it

is more likely than not that injury would not have occurred but for the defendant's negligence. *Id.* at 164-165.

We do not believe a reasonable person could conclude that plaintiff's evidence makes it more probable that Daniel Houlihan would not have drowned if the water had been searched immediately after his mother reported him missing. Plaintiff's expert testified that Daniel Houlihan would have had to have been found within five to nine minutes from the time he left his family in order to make a full recovery, and within twelve minutes to avoid death. No one knows exactly when Daniel Houlihan left his family because no one saw him leave. Based on his mother's testimony, between three and seven minutes passed before she notified the lifeguards that Daniel Houlihan was missing. Because the window of opportunity was five to twelve minutes, Daniel Houlihan could already have been dead for two minutes when the lifeguards were informed that he was missing. Plaintiff has submitted no evidence that makes his theory of when Daniel Houlihan drowned more probable than the alternatives. Accordingly, under Michigan law governing the cause in fact question, *Skinner*, we are obliged to affirm the trial court's dismissal of plaintiff's claim.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell